

**BEFORE THE NEBRASKA TAX EQUALIZATION
AND REVIEW COMMISSION**

SMITH FAMILY TRUST by H. WAYNE)	
SMITH, TRUSTEE)	
)	Case No. 07C-219
Appellant,)	
)	DECISION AND ORDER AFFIRMING
v.)	THE DECISION OF THE DOUGLAS
)	COUNTY BOARD OF EQUALIZATION
DOUGLAS COUNTY BOARD OF)	
EQUALIZATION,)	
)	
Appellee.)	

The above-captioned case was called for a hearing on the merits of an appeal by H Wayne Smith, Trustee of the Smith Family Trust ("the Taxpayer") to the Tax Equalization and Review Commission ("the Commission"). The hearing was held in the Commission's Hearing Room on the sixth floor of the Nebraska State Office Building in the City of Lincoln, Lancaster County, Nebraska, on August 19, 2008, pursuant to an Order for Hearing and Notice of Hearing issued June 18, 2008. Commissioners Warnes, Salmon, and Hotz were present. Commissioner Wickersham was excused from participation by the presiding hearing officer. The appeal was heard by a panel of three commissioners pursuant to 442 Neb. Admin. Code ch.4 §11 (10/07). Commissioner Warnes was the presiding hearing officer.

H. Wayne Smith, Trustee of the Smith Family Trust, was present at the hearing with James R. Place as legal counsel.

Thomas S. Barrett, a Deputy County Attorney for Douglas County, Nebraska, was present as legal counsel for the Douglas County Board of Equalization ("the County Board").

The Commission took statutory notice, received exhibits and heard testimony.

The Commission is required by Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006) to state its final decision and order concerning an appeal, with findings of fact and conclusions of law, on the record or in writing. The final decision and order of the Commission in this case is as follows.

I. ISSUES

The Taxpayer has asserted that actual value of the subject property as of January 1, 2007, is less than actual value as determined by the County Board. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining actual value of the subject property is unreasonable or arbitrary; and

The actual value of the subject property on January 1, 2007.

The Taxpayer has asserted that taxable value of the subject property as of January 1, 2007, is not equalized with the taxable value of other real property. The issues on appeal related to that assertion are:

Whether the decision of the County Board determining the equalized taxable value of the subject property is unreasonable or arbitrary;

Whether the equalized taxable value of the subject property was determined by the County Board in a manner and an amount that is uniform and proportionate as required by Nebraska's Constitution in Article VIII §1; and

The equalized taxable value of the subject property on January 1, 2007.

II. FINDINGS OF FACT

The Commission finds and determines that:

1. The Taxpayer has a sufficient interest in the outcome of the above captioned appeal to maintain the appeal.
2. The parcel of real property to which this appeal pertains is described as OLD MILL PLAZA LOT 17 BLOCK 0 W 67 S 245 FT LT 15 & 95 FT LT 16 & ALL LT 17 245 x 217 in Douglas County, Nebraska, ("the subject property").
3. Actual value of the subject property placed on the assessment roll as of January 1, 2007, ("the assessment date") by the Douglas County Assessor, value as proposed in a timely protest, and actual value as determined by the County Board is shown in the following table:

Case No. 07C-219

Description: OLD MILL PLAZA LOT 17 BLOCK 0 W 67 S 245 FT LT 15 & 95 FT LT 16 & ALL LT 17 245 x 217, Douglas County, Nebraska.

	Assessor Notice Value	Taxpayer Protest Value	Board Determined Value
Land	\$383,900.00	\$393,900.00	\$383,900.00
Improvement	\$1,257,300.00	\$591,100.00	\$1,045,900.00
Total	\$1,641,200.00	\$975,000.00	\$1,429,800.00

4. An appeal of the County Board's decision was filed with the Commission.
5. The County Board was served with a Notice in Lieu of Summons and duly answered that Notice..

6. 6.An Order for Hearing and Notice of Hearing issued on June 18, 2008 set a hearing of the appeal for August 19, 2008, at 9:00 a.m. CDST.
7. 7.An Affidavit of Service which appears in the records of the Commission establishes that a copy of the Order for Hearing and Notice of Hearing was served on all parties.
8. 8.Actual value of the subject property as of the assessment date for the tax year 2007 is:

Land value	\$ 383,900.00
Improvement value	<u>\$1,045,900.00</u>
Total value	<u><u>\$1,429,800.00.</u></u>

III. APPLICABLE LAW

1. Subject matter jurisdiction of the Commission in this appeal is over all issues that affect actual value. Neb. Rev. Stat. 77-5016 (7) (Supp. 2006).
2. Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued." Neb. Rev. Stat. §77-112 (Reissue 2003).
2. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in

section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. §77-112 (Reissue 2003).

3. Use of all of the statutory factors for determination of actual value is not required. All that is required is use of the applicable factors. *First National Bank & Trust of Syracuse v. Otoe Cty.*, 233 Neb. 412, 445 N.W.2d 880 (1989).
4. “Actual value, market value, and fair market value mean exactly the same thing.” *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).
5. Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value. Neb. Rev. Stat. §77-131 (Reissue 2003).
6. All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation. Neb. Rev. Stat. §77-201(1) (Cum. Supp. 2006).
7. “Taxes shall be levied by valuation uniformly and proportionately upon all real property and franchises as defined by the Legislature except as otherwise provided in or permitted by this Constitution.” *Neb. Const.*, Art. VIII, §1.
8. Equalization to obtain proportionate valuation requires a comparison of the ratio of assessed to actual value for the subject property and comparable property. *Cabela's Inc. v. Cheyenne County Bd. of Equalization*, 8 Neb.App. 582, 597 N.W.2d 623 (1999).
9. Uniformity requires that whatever methods are used to determine actual or taxable value for various classifications of real property that the results be correlated to show

uniformity. *Banner County v. State Board of Equalization*, 226 Neb. 236, 411 N.W.2d 35 (1987).

10. Taxpayers are entitled to have their property assessed uniformly and proportionately, even though the result may be that it is assessed at less than the actual value. *Equitable Life v. Lincoln County Bd. of Equal.*, 229 Neb. 60, 425 N.W.2d 320 (1988); *Fremont Plaza v. Dodge County Bd. of Equal.*, 225 Neb. 303, 405 N.W.2d 555 (1987).
11. The constitutional requirement of uniformity in taxation extends to both rate and valuation. *First Nat. Bank & Trust Co. v. County of Lancaster*, 177 Neb. 390, 128 N.W.2d 820 (1964).
12. In the evaluation of real property for tax purposes, where buildings and improvements are taxable as a part of the real estate, the critical issue is the actual value of the entire property, not the proportion of that value which is allocated to the land or to the buildings and improvements by the appraiser. *Bumgarner v. Valley County*, 208 Neb. 361, 303 N.W.2d 307 (1981).
13. If taxable values are to be equalized it is necessary for a Taxpayer to establish by clear and convincing evidence that valuation placed on his or her property when compared with valuations placed on similar property is grossly excessive and is the result of systematic will or failure of a plain legal duty, and not mere error of judgement. There must be something more, something which in effect amounts to an intentional violation of the essential principle of practical uniformity. *Newman v. County of Dawson*, 167 Neb. 666, 94 N.W.2d 47 (1959).

14. A presumption exists that the County Board has faithfully performed its duties and has acted on competent evidence. *City of York v. York County Bd. Of Equalization*, 266 Neb. 297, 64 N.W.2d 445 (2003).
15. The presumption in favor of the county board may be classified as a principle of procedure involving the burden of proof, namely, a taxpayer has the burden to prove that action by a board of equalization fixing or determining valuation of real estate for tax purposes is unauthorized by or contrary to constitutional or statutory provisions governing taxation. *Gordman Properties Company v. Board of Equalization of Hall County*, 225 Neb. 169, 403 N.W.2d 366 (1987) (citations omitted).
16. The presumption remains until there is competent to the contrary is presented at which point the presumption disappears. From that point forward, the reasonableness of the valuation fixed by the County Board becomes one of fact based on all of the evidence presented. *Garvey Elevators, Inc. v. Adams County Bd. Of Equalization*, 261 Neb. 130, 621 N.W.2d 518 (2001).
17. The Commission can grant relief only if there is clear and convincing evidence that the action of the County Board was unreasonable or arbitrary. See, Neb. Rev. Stat. §77-5016 (8) (Cum. Supp. 2006), and e.g. *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb.App. 171, 645 N.W.2d 821 (2002).
18. "Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved." *Castellano v. Bitkower*, 216 Neb. 806, 812, 346 N.W.2d 249, 253 (1984).

19. A decision is "arbitrary" when it is made in disregard of the facts and circumstances and without some basis which could lead a reasonable person to the same conclusion. *Phelps Cty. Bd. of Equal. v. Graf*, 258 Neb 810, 606 N.W.2d 736 (2000).
20. A decision is unreasonable only if the evidence presented leaves no room for differences of opinion among reasonable minds. *Pittman v. Sarpy Cty. Bd. of Equal.*, 258 Neb 390, 603 N.W.2d 447 (1999).
21. "An owner who is familiar with his property and knows its worth is permitted to testify as to its value." *U. S. Ecology v. Boyd County Bd. Of Equalization*, 256 Neb. 7, 16, 588 N.W.2d 575, 581 (1999).
22. The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary. *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).
23. A Taxpayer, who only produced evidence that was aimed at discrediting valuation methods utilized by county assessor, failed to meet burden of proving that value of property was not fairly and proportionately equalized or that valuation placed upon property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).
24. Taxpayer must introduce competent evidence of actual value of the subject property in order to successfully claim that the subject property is overvalued. *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981).

IV. ANALYSIS

The subject property is a commercial parcel consisting of a one story office building with 14,654 gross square feet. (E2:2). The property was built in 1978 and is rated as average in quality and condition. (E2:5).

The Taxpayer testified that there were two tenants in the subject property on January 1, 2007. The larger of the two tenants paid rent of \$14 per square foot. The rent of \$14 per square foot was divided with \$7 per square foot paid directly to the Taxpayer and an additional \$7 per square foot paid by the tenant to the providers of services. The Taxpayer did not provide written evidence of the expenses or income for the subject property. The testimony of the Taxpayer was that there was not a written lease by the major tenant.

The Taxpayer testified that the second tenant rented 1,400 square feet for \$1,832 per month. This rental would equate to \$15.70 per square foot ($\$1,832/\text{month} \times 12 \text{ months/year}$ divided by 1,400 square feet).

The Taxpayer testified that his opinion of actual value on January 1, 2007, was not based on the income approach. He testified that his opinion of actual value on January 1, 2007, was \$1,050,000 which he based on an offer of \$1,000,000 he had made on or about 2004 to the seller of the subject property increased by the cost of living index. The seller had been a past business associate and the offer to purchase was part of a settlement agreement to buy out this business associate. The Taxpayer did not provide evidence of the cost of living index.

Nebraska law requires that actual value be determined for purposes of taxation. "Actual value of real property for purposes of taxation means the market value of real property in the

ordinary course of trade. Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guide lines in section 77-1371, (2) income approach, and (3) cost approach. Neb. Rev. Stat. 77-112 (2003). A Taxpayer must show that the approach used to prove actual or fair market value is a professionally approved mass or fee appraisal approach and demonstrate application of the approach. The method used by the Taxpayer to support his opinion of actual value is not in compliance with Nebraska law nor within professionally accepted mass or fee appraisal methods.

The Taxpayer alleged that the amount of monies he paid to settle and buy out his past business associate for his interest in the subject property is an indica of actual value of the subject property. Testimony of the Taxpayer was that he paid \$325,000 for his past business associate's 1/3 interest in the subject property as shown on Exhibits 10 page 3 and Exhibit 10 page 7. The Taxpayer alleges that this buy out on May 21, 2004, is a controlling and critical consideration in his determination of the fair market value as of January 1, 2007.

“Actual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used.” Neb. Rev. Stat. 77-112 (2003). The evidence provided by the testimony of the Taxpayer was that the buy out was not exposed to the open market. The Testimony of the Taxpayer provided evidence that there were several considerations affecting the willingness of the buyer and seller to complete the buyout. The Commission finds that the buy out was neither a transaction following exposure in the open market, nor was it an arm's length transaction. The buy out was just what it was called

in Exhibit 10 page 3, "Settlement Agreement and Mutual Release." The Commission will not speculate as to all of the motives of both the buyer/Taxpayer and the past business associate/seller. There was no evidence provided to the Commission that this business transaction was documented by the transfer of a deed properly executed and filed with the County Register of Deeds.

The Commission further notes that even if the buy out were to be considered similar to a sales price that fact alone would not be the sole determination of actual value. "It is true that the purchase price of property may be taken into consideration in determining the actual value thereof for assessment purposes, together with all other relevant elements pertaining to such issue; however, standing alone, it is not conclusive of the actual value of property for assessment purposes. Other matters relevant to the actual value thereof must be considered in connection with the sale price to determine actual value. Sale price is not synonymous with actual value or fair market value." *Forney v. Box Butte County Bd. of Equalization*, 7 Neb.App. 417, 424, 582 N.W.2D 631, 637 (1998).

The Taxpayer testified regarding deficiencies to the subject property which he believed diminished its fair market value. These deficiencies included a roof leakage, outside drainage into the subject building, snakes entering the building, and a limited access to the property at rush hours. The Taxpayer did not provide evidence which quantified these deficiencies and the Commission cannot speculate as to the valuation reduction, if any, that they would produce.

The County Appraiser testified that the County valued the subject property using the income approach to valuation as shown on Exhibit 2 page 23. The Taxpayer objected to the County's use of a market rent of \$17 per square foot and proposed that \$14 per square foot was

his actual rent. The Taxpayer had a similar objection to the use of market expenses rather than actual expenses, despite the fact that the Taxpayer did not provide itemization of expenses. The Commission finds that the County's use of market rent and market expenses is permissible using mass appraisal standards for the income approach to valuation. *Mass Appraisal of Real Property*, Robert J. Gloudemans, IAAO, 1999, page 20. Mass appraisal is authorized for valuation in accordance with Neb. Rev. Stat. 77-112 (2003). The County Appraiser testified that the alleged deficiencies to the subject property were taken into account in the expense ratio used by the County on Exhibit 2 page 23. The County Appraiser further testified that there was no recording of the buyout and that the transaction was "at best an unrecorded partial sale" which was not used for the determination of a sales ratio.

The Taxpayer did not provide evidence of actual value for any comparable properties and the Commission finds that the Taxpayer has not shown by clear and convincing evidence that the County Board was arbitrary or unreasonable in determining that taxable value of the subject property as of January 1, 2007, is equalized with the taxable value of other real property.

A taxpayer who offers no evidence that the subject property is valued in excess of its actual value and who only produces evidence that is aimed at discrediting the valuation methods utilized by county assessor fails to meet his or her burden of proving that the value of the property was not fairly and proportionately equalized or that valuation placed upon the property for tax purposes was unreasonable or arbitrary. *Beynon v. Board of Equalization of Lancaster County*, 213 Neb. 488, 329 N.W.2d 857 (1983).

The Commission further finds that the Taxpayer has not rebutted the presumption

that the County Board failed to faithfully perform their duties or acted without sufficient competent evidence. *City of York v York County Bd of Equalization*, 266 Neb. 297, 665 N.W. 2d 445 (2003) and *Garvey Elevators, Inc. v. Adams County Bd. of Equalization*, 261 Neb. 130, 621 N.W. 2d, 518 (2001). Moreover, the Commission has examined all of the evidence presented and finds that the Taxpayer has not proven by clear and convincing evidence that the County Board was arbitrary or unreasonable in their decision, nor has he proven by the reasonableness of the evidence a different valuation for the subject property. The appeal of the Taxpayer is denied.

**V.
CONCLUSIONS OF LAW**

1. The Commission has subject matter jurisdiction in this appeal.
2. The Commission has jurisdiction over the parties to this appeal.
3. The Taxpayer has not rebutted the presumption that the County Board failed to faithfully perform its duties or acted without sufficient competent evidence.
4. The Taxpayer has not adduced sufficient, clear and convincing evidence that the decision of the County Board is unreasonable or arbitrary and the decision of the County Board should be affirmed.

**VI.
ORDER**

IT IS ORDERED THAT:

1. The decision of the County Board determining taxable value of the subject property as of the assessment date, January 1, 2007, is affirmed.
2. Actual value of the subject property for the tax year 2007 is:

Land value	\$ 383,900.00
Improvement value	<u>\$1,045,900.00</u>
Total value	<u><u>\$1,429,800.00.</u></u>

3. This decision, if no appeal is timely filed, shall be certified to the Douglas County Treasurer, and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (Cum. Supp. 2006).
4. Any request for relief, by any party, which is not specifically provided for by this order is denied.
5. Each party is to bear its own costs in this proceeding.
6. This decision shall only be applicable to tax year 2007.
7. This order is effective for purposes of appeal on October 1, 2008.

Signed and Sealed. October 1, 2008.

Nancy J. Salmon, Commissioner

Robert W. Hotz, Commissioner

William C. Warnes, Commissioner

SEAL

APPEALS FROM DECISIONS OF THE COMMISSION MUST SATISFY THE REQUIREMENTS OF NEB. REV. STAT. §77-5019 (CUM. SUPP. 2006), OTHER PROVISIONS OF NEBRASKA STATUTES, AND COURT RULES.